No. 2722

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM HANLEY,
Appellant,

vs.

PACIFIC LIVE STOCK COMPANY
(a corporation),
Appellee.

BRIEF FOR APPELLEE

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellee.

Filed this.....day of February, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Condition of Record on This Appeal.

Before proceeding to a consideration of this appeal, it is necessary to call the attention of the court to the very unusual and unsatisfactory condition of the record on this appeal, which is deemed to be very prejudicial to the rights of the appellee. After the appeal was perfected, the appellant obtained from the trial court an order, under Equity Rule 75, permitting the testimony to be reproduced in the exact words of the witnesses (Trans. p. 90). The appellant thereupon filed with the clerk of the court the portions of the evidence which he desired incorporated in the record on appeal. The appellee thereupon filed its praecipe requesting that the balance of the testimony be likewise incorporated in the record on appeal. The matter came before the court, and

the court made an order (Record pp. 88-90) providing that the transcript on appeal should be printed and should comprise certain things therein specified, including among others, the "Statement of the evidence as prepared by the appellant and lodged with the clerk of this court," and then provided

> "It is further ordered that the whole of the record in this cause, or such parts thereof as the parties may desire, shall be sent to the Circuit Court of Appeals for the Ninth Circuit to be considered on this appeal to supplement the printed record above ordered".

In pursuance of this order the entire record, including all of the testimony in the lower court, was sent to this court, but the appellant proceeded in assumed compliance with the act of February 13, 1911 (Chapter 47) to himself print what he designates "Transcript of the record", but which printed transcript contains only the portions of the testimony prepared by the appellant and lodged with the clerk of the trial court by him, and entirely omits the balance of the testimony requested to be included by the appellee and ordered to be transmitted to this court by the trial judge and actually transmitted to this court. Upon the record being filed with this court, the appellee again filed its praecipe in this court, requiring the omitted part of the record to be printed, and the clerk of this court, in pursuance of that request, has printed the same in a transcript entitled "Portions of original transcript of testimony printed pursuant to praecipes of counsel for appellee, filed January 10 and 13, 1916". The result of this is that disconnected portions of the testimony of each witness will be found in the so-called "Transcript of record" printed by the appellant

and other disconnected portions of the testimony of the same witnesses will be found in the portion of the transcript requested by the appellee and printed by the clerk of this court. We most earnestly insist that the appellant in this regard has not pursued the law and rules of this court in preparing the record on this appeal, and the prejudicial effect to appellee will be obvious to the court when it appears that a large portion of the testimony taken in the lower court, which is referred to in the written opinion of the judge of the trial court and made the basis of his decision, is omitted from the record as made up by the appellant and printed by him in this case. At least one-third of the testimony taken in the lower court and certified to this court and directed by the trial court to be "sent to the Circuit Court of Appeals for the Ninth Circuit to be considered on this appeal" has been entirely omitted from the transcript printed by the appellant, and although it has now been printed it is in separate volumes and the court could not without a laborious examination of the two transcripts read in proper consecutive form the testimony of any one witness in this case. There are several methods provided by Equity Rule 75 and the rules of this court for perfecting a record in this court: One is to have all of the testimony reduced to narrative form and certified by the trial judge, but this was not attempted to be done in this case; second, each party may, as was done in this case, request what shall go into the record of this court, and any disputes as to what is proper are settled by the trial judge. This was done in this case, and the court ordered that the whole of the record in the case should be sent to this court, but the trial court attempted to

provide that the transcript should be printed and the printed transcript should contain certain things, and the whole of the transcript should be sent to this court "and supplement the printed record above ordered". This was entirely irregular. The trial judge has nothing whatever to do with the printing of the record. It is for the trial judge to determine what shall constitute the record on appeal, and he did so properly by directing that the entire record in the case should be sent to the Circuit Court of Appeals, and this was done. After it is determined what is to constitute the record on appeal, the printing is a mere ministerial act, ordinarily to be done by the clerk of this court, but under the act above referred to it may be done by the appellant himself, but there is no rule of law whereby he may print only the portions of the record which he has requested to be sent to this court and leave the burden upon the appellee or the clerk of this court to print the portion of the record which it has requested and which the trial court has ordered to be, and which has in fact been, filed in this court as a part of the record on appeal. Appellant in his brief states that the court ordered the record in the original case "since its inception in 1899" to be brought up. We only interpreted the order to refer to the record in the contempt matter (Appellant's Printed Rec., pp. 88-90), but we are informed that the entire record was sent down, although not printed, and still counsel have on page 72 of their brief attempted to quote from alleged testimony which was no part of the contempt proceeding and not included in the printed record. We therefore earnestly insist that either the appeal should be dismissed for failure to comply with the rules of this court in regard to the printing of the

record, or that the same be dismissed unless a new record is printed containing the portions of the record requested to be printed by both parties in proper consecutive order.

In attempting to present the case to the court on the present record, we will refer to the foregoing printed records as follows: "Appellant's Printed Record" and "Appellee's Printed Record".

THE ORDER ADJUDGING HANLEY GUILTY OF CONTEMPT, BEING PUNITIVE AND NOT BEING COMPENSATORY FOR COMPLAINANT'S LOSS CANNOT BE REVIEWED IN THIS COURT BY APPEAL, BUT ONLY BY WRIT OF ERROR, AND THE APPEAL SHOULD THEREFORE BE DISMISSED.

This rule has been consistently adherred to by the Supreme Court and circuit courts of appeal, as shown by the following cases:

Bessette v. *W. B. Conkey Co.*, 194 U. S. 324; 24 Sup. Ct. 665; 48 L. ed. 997;

In re Christensen Engineering Co., 194 U. S. 458; 24 Sup. Ct. 729; 48 L. ed. 1072;

In re Merchants' Stock & Grain Co., 223 U. S. 639; 56 L. ed. 584;

Sessions v. *Gould*, 63 Fed. 1001;

Gould v. *Sessions*, 67 Fed. 163;

Kreplik v. *Couch Patents Co.*, 190 Fed. 565;

Continental Gin Co. v. *Murray Co.*, 162 Fed. 873;

Bullock Electric & Mfg. Co. v. *Westinghouse El. & Mfg. Co.*, 129 Fed. 101.

The same rule applies where the proceeding is both punitive and remedial, the punitive features always be-

ing held to dominate the case and fix its character for the purpose of review.

> *In re Merchants' Stock & Grain Co.*, 223 U. S. 639; 56 L. ed. 584;
>
> *Kreplik* v. *Couch Patents Co.*, 190 Fed. 565;
>
> *Continental Gin Co.* v. *Murray Co.*, 162 Fed. 873.

The proceeding in the case at bar, while entitled in the original case, was also entitled "In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith" (Appellant's Printed Rec., p. 4), and after alleging the contempt contained the following prayer:

> "WHEREFORE the said complainant asks that an order to show cause be issued, and that said defendants be dealt with in such manner as may be meet in the premises" (Appellant's Printed Rec., p. 25).

No evidence was introduced as to the pecuniary damage to the complainant, and the court in its opinion as to the defendant Hanley, after adjudging him guilty of contempt and providing how he might purge himself from that contempt, among other things by paying two hundred and fifty dollars for the use by plaintiff, said:

> "This sum I consider in no way compensatory for plaintiff's loss, but I impose it by way of warning against any further contempt of the kind. Gompers v. Buck Stove & Range Co., 221 U. S. 418". (Appellant's Printed Rec., p. 73),

and in the formal order the court provided:

> "This later sum, however, not to be considered as wholly compensatory for plaintiff's loss". (Appellant's Printed Rec., p. 78).

It would seem clear from this that the punishment imposed was by way of warning, which is one of the prime objects of all criminal penalties, and was expressly designated as not being compensatory, and under these circumstances, it does not seem necessary to consider cases where the record leaves it in doubt whether the proceeding is intended to be punitive or remedial. In the case of *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418; 55 L. ed. 797, the court considered such a case and referred to the various matters which are important in determining the character of the proceeding. It held that the title cannot be determinative of the character of a proceeding. (See also to the same effect: *Warden* v. *Searle*, 121 U. S. 25; 30 L. ed. 857; 7 Sup. Ct. 814; *Ex parte Ah Men*, 77 Cal. 198; *U. S.* v. *Huff*, 200 Fed. 700, 702).

The fact that costs are allowed is not controlling, for costs are frequently imposed in cases of criminal contempt, and since the costs are for the payment of witness fees and things of that kind, it cannot be very material whose hands they pass through.

Brown v. *Brown*, 4 Ind. 627; 58 Am. Dec. 641;
In re Chartz, 29 Nev. 110; 85 Pac. 352;
State v. *Winbauer*, 21 N. D. 70; 128 N. W. 679;
State v. *Ducin*, 46 Kans. 695; 27 Pac. 148;
In re Moore, 63 N. Car. 397;
State v. *Heiser*, 20 N. D. 357; 127 N. W. 72;
State v. *Rinehart*, 92 Tenn. 270; 21 S. W. 524;
Ex parte Whitmore, 9 Utah 441; 35 Pac. 524;
People v. *Rochester etc. Co.*, 76 N. Y. 294.

The court further held that the prayer of the petition which was the basis of the proceeding was largely controlling, and that the prayer in that proceeding, which was for "such relief as the nature of *its case* may require" was appropriate to a civil suit. If the prayer is controlling it will be seen that the prayer in this case was not appropriate to a civil suit, but was

> "that the defendants be dealt with in such manner as may be meet in the premises".

Nor is it material to inquire whether the court erred in directing a payment to the complainant which was not compensatory or wholly compensatory. If the court erred, that error could only be corrected by writ of error, and where the fine is partly by way of punishment and partly by way of compensation, the proceeding is deemed criminal and only reviewable on writ of error. (*In re Merchants' Stock & Grain Co.*, 223 U. S. 639, supra.)

The fact that the court specified certain things which the defendants might do to purge themselves of the contempt which were for the benefit of the complainant did not change the character of the proceeding, since it is always proper to make such directions for the future guidance of the parties.

Pages v. *McLaren*, 7 N. J. L. J. 309;

Wharton v. *Stoutenburgh*, 39 N. J. Eq. 299;

Columbia Co. v. *Columbia*, 4 S. C. 388;

Territory v. *Nugent*, 1 Martin (La.), 103;

People v. *Van Buren*, 136 N. Y. 252.

General Outline of Case.

It appears that on October 3, 1899, the Pacific Live Stock Company filed in the United States Circuit Court for the District of Oregon its bill of complaint (*) against a large number of persons, among other W. D. Hanley, C. H. Voegtly, George W. Young, Hull Hotchkiss and Caspar Luig.

The bill of complaint set up the ownership of a large amount of land in Harney Valley, Oregon, riparian to and irrigated by the waters of Silvies river, and alleged that the defendants had

> "wrongfully entered upon the channels of said river and the channels of its forks above said lands of your orator or some of them, and have wrongfully constructed and are wrongfully maintaining divers dams in said channels and ditches leading therefrom",

and among other things alleged that the defendant William D. Hanley had one dam, the defendants George W. Young, Hull Hotchkiss and C. H. Voegtly had one dam, and the defendant Caspar Luig had one dam, and that by means thereof were diverting the water away from complainant to its irreparable injury (pp. 1113-16).

The prayer of the bill was as follows:

> "For as much as your orator can have no adequate relief except in a court of equity and to the end that the defendants may, if they can, show why your orator should not have the relief hereby prayed, your orator asks that they may each be compelled to make answer to this, its bill of complaint, and

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(*) This bill of complaint is printed in case No. 2036, in this court, and is made a part of the record on appeal herein by reference. (Appellant's Printed Rec., p. 3.)

to make a full disclosure and discovery in regard to the rights or pretended rights, if any they have, for diverting the waters from your orator's said lands and obstructing its flow therein, as is hereinabove charged, and that they may each, according to the best and utmost of their knowledge, remembrance, information and belief, make full, true, direct, and perfect answer to the matters hereinabove stated and charged, but not under oath, an answer under oath being hereby expressly waived.

"And that your honors may be pleased to enter a decree in this cause perpetually enjoining and restraining the said defendants and each of them, their attorneys, agents, servants and employees, from diverting any of the water of Silvies river or the east or west fork thereof from their channels or impeding the flow of any of said water down to and upon your orator's said lands as said water has heretofore been wont to flow therein when not interfered with by the defendants, and that said defendants and each of them may be required to remove their said dams from the said channels of Silvies river and said forks thereof and may be perpetually enjoined and restrained from rebuilding the same or in any manner obstructing the flow of said water, and that your orator may be awarded a judgment against the defendants for its costs and disbursements of this suit and that it may have such further or other relief as to your honors may seem to be just and equitable."

The defendant W. D. Hanley filed an answer, the affirmative allegations of which will be found on pages 4 to 13 of appellant's printed record. By that answer he alleged that he was the owner of certain land, and the lessee of certain land specifically described in the answer and all situated on the *east fork* of Silvies river and alleged that he was the owner of a dam referred to as the Twenty-one Dam (being situated in section 21,

township 23 south, range 31 east), and a ditch leading from the river to the east above the same known as Upper Hanley Ditch, and also a small ditch on the other side of the river above the same dam onto section twenty-one. The answer further alleged (Appellant's Printed Record, pp. 9-11) that he was the owner of a ditch taking out of the east fork of the river in the north half of section twenty-seven, and referred to herein as the drain ditch,

> "and that the same was built to be used and is used by this defendant *solely* for the purpose of draining water from certain of his land as above described, *and was not intended to be used and never has been used by him for the purpose of irrigation;* that there is no dam in connection with said ditch and that by draining the water off from his land through said ditch he prevents a large tract thereof from being so submerged with water as to render it valueless, and that thereby he is enabled to and does reclaim a large body of his land so that the same can and does produce abundant and valuable crops of wild grass every year which is used for hay and pasturage by this defendant".

No right to water through the drain ditch was claimed and no right to maintain any other dams or ditches or divert any other water from the river was set up or alleged. *No claim of right to either the Luig or Young dam or the West Fork was made by him.*

A final decree was entered in the case, which is likewise found in cause No. 2036 in this court, and made part of this record by reference. This decree was entered largely upon certain stipulations which are embodied therein. Among other things, the decree in finding four recited the ownership by W. D. Hanley of the land

owned and leased by him on the east fork of Silvies river. In findings fourteen and fifteen it found the ownership of lands by Mrs. A. E. Young, and George W. Young, in the northeast quarter of section thirty and a leasehold interest in the north half of section twenty-eight (28), township thirty-two (32) south, range twenty-one (21) east. By finding 16 it found that Hull Hotchkiss was the owner of the northwest quarter of section thirty (30), township twenty-three (23) south, range thirty-one (31) east; and that C. H. Voegtly was the owner of the southwest quarter of the same section. By finding 22 it found that Caspar Luig was the owner of certain land in section six (6), township twenty-four (24) south, range thirty-one (31) east. By finding thirty-two (32) the following stipulation was recited as to the defendant W. D. Hanley:

> "It is hereby stipulated by and between the complainant, the Pacific Live Stock Company, and the defendant W. D. Hanley, that a decree shall be entered in this suit as follows:
>
> First: That the defendant W. D. Hanley may maintain his dam in the east fork of Silvies river where the same is now constructed and built on and across said river in section 21, township 23 south, range 31 east, Willamette Meridian, and may maintain his ditches leading from said dam as the same are now constructed and built, during the irrigating season of each year and at no other time, the said irrigating season to begin after the spring flood of each year and from the 5th day of May of each year, and shall continue from said time until the 1st day of July of each year; and the said defendant, W. D. Hanley, may retain the waters of said Silvies river during said irrigating season as above described and by means of the dam as the same is now constructed in said river, may divert and use so much thereof by

means of his dam and of the ditches leading therefrom as shall be necessary to irrigate sections 21 and 27 in township 23 south, range 31 east of the Willamette Meridian, also all of section 22 except the south half of the southwest quarter of said section, and also the west half of section 26, also section 35, section 23 and section 25 in said township and range.

Second: That the said W. D. Hanley may maintain his ditch constructed across a portion of the land above described leading out of the east fork of Silvies river on the east side thereof on the south half of section 27 above described and extending south easterly until it enters into and upon the land of the complainant on or near the southwest quarter of the southeast quarter of section 26, township 23 south, range 31 east, W. M., but shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation."

Fourth: If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said east fork of said Silvies River shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river.

Fifth: Except as above provided in 1, 2, 3, 4, *supra* the complainant shall have a decree in this suit according to the prayer of its complaint."

By finding 35 the following stipulation was recited as to the defendants George W. Young and Mrs. A. E. Young:

"It is hereby stipulated by and between the complainant the Pacific Live Stock Company, and the defendants Geo. W. Young and Mrs. A. E. Young that a decree shall be entered herein against the said defendants and in favor of the complainant as prayed for in the bill of complaint herein, save and except that said decree shall provide that one dam may be maintained in the west fork of Silvies river by said defendants, or either of them, where the same is now constructed and built in, over and upon the said west fork of Silvies river on the lands of the said Mrs. A. E. Young described as the northeast quarter of section 30, T. 23 S., R. 31 E., W. M., and one or more ditches maintained in connection with said dam by said defendants jointly or severally, and the waters of the said west fork of Silvies river obstructed and restricted by said dam and diverted by said dam and said ditches during the irrigating season each year commencing on the 12th day of May each year and ending on the first day of July each year and at no other times, in sufficient quantities to irrigate the lands of the defendants described as the northeast quarter of section 30 and the north half of section 29, T. 23 S., R. 31 E., W. M. Said decree shall further provide that the said defendants Geo. W. Young and Mrs. A. E. Young shall have the use and enjoyment of such waters as may flow from the west fork of Silvies river while the channel in said river is unobstructed and from natural causes at all times when the same shall flow upon said lands by overflowing the banks of said river or by flowing through the ditches of said defendants while the flow of the water in said river is unobstructed by the dam of said defendants above described. Said decree shall further provide that the said Geo. W. Young and Mrs. A. E. Young may maintain their dam at or near the point where the same is now maintained from the 21st day of July to the 23d day of July, both dates inclusive, each year and by means of said dam and their ditches in connection therewith may divert so much of the waters of the west fork of Silvies river as may be

necessary during the period aforesaid to irrigate such land as the said Geo. W. Young and Mrs. A. E. Young may have in garden and orchard upon the lands above described."

By finding thirty-six (36) the following stipulation was recited as to Hull Hotchkiss and C. H. Voegtly:

"It is hereby stipulated by and between the complainant the Pacific Live Stock Company and the defendants C. H. Voegtly and Hull Hotchkiss that a decree shall be entered herein against the said defendants and in favor of said complainant as prayed for in the bill of complaint herein, save and except that said decree shall provide that one dam may be maintained in the west fork of Silvies river by said defendants or any or either of them at or near the place where the same is now constructed and built in, over and upon the said west fork of Silvies river on the lands of the said Geo. W. Young described as the northeast quarter of section 30, T. 23 S., R. 31 E., W. M., and one or more ditches maintained in connection with said dam by said defendants jointly or severally and the waters of the west fork of Silvies river obstructed and restricted by said dam and diverted by said dam and said ditches during the irrigating season each year commencing on the 12th day of May each year and ending on the 1st day of July each year and at no other times, and in sufficient quantities to irrigate the lands of said defendants described as follows, that is to say, the land of said Mrs. A. E. Young are the northeast quarter of section 30 and the north half of section 29, and the lands of the said Hull Hotchkiss are the east half of the northwest quarter and lots 1 and 2 in section 30, and the lands of the said defendant C. H. Voegtly are the east half of the southwest quarter and lots 3 and 4 of section 30, all in township 23 S., R. 31 E., W. M. And said decree shall further provide that the said defendants Hull Hotchkiss and C. H. Voegtly shall have the use and enjoyment of such waters as may flow from the west fork of Silvies river while the

channel in said river is unobstructed and from natural causes at all times when the same shall flow upon said lands by overflowing the banks of said river or by flowing through the ditches of said defendants while the flow of the water in said river is unobstructed by the dam of said defendants above described."

By finding thirty-eight (38) the following stipulation was recited as to the defendant Caspar Luig:

"It is hereby stipulated by and between the complainant the Pacific Live Stock Company and the defendant Casper Luig that a decree shall be entered in this cause against said defendant Casper Luig as prayed for in the bill of complaint, save and except that said decree shall provide that said defendant may maintain his dam in the west fork of Silvies river and thereby obstruct the flow of the water in said west fork of said river where said dam is now constructed in section 31, T. 23 S., R. 31 E., W. M., during the irrigating season each year, such irrigating season to begin on the 15th day of May each year and end on the 1st day of July each year and may use the waters of the west fork of Silvies river so obstructed during said irrigating season for the purpose of and in sufficient quantity to irrigate the east half of the southwest quarter and lots 6 and 7 of section 6 and the southeast quarter of the northwest quarter and lots 3 and 4 and 5 of section 6, all in T. 24 S., R. 31 E., W. M., and upon no other lands and during no other period, and may also use and enjoy so much of the waters of said west fork of Silvies river during all other times as may flow upon said lands or any thereof in the natural flow of the water of said river without obstruction to the channel of said river, and that said defendant Casper Luig shall not be required to remove the frame or skeleton of his said dam at any season but except during the irrigating season shall keep said dam open and the channel of the river unobstructed thereby."

The decree was then entered in accordance with these stipulations, by paragraph eleven (11) as to W. D. Hanley, by paragraph fourteen (14) as to Mrs. A. E. Young and George W. Young, by paragraph fifteen (15) as to Hull Hotchkiss and C. H. Voegtly, and by paragraph seventeen (17) as to Caspar Luig. The decree then contained the following provision:

> "19. That the defendants W. D. Hanley, * * * C. H. Voegtly, George W. Young, Mrs. A. E. Young, * * * Hull Hotchkiss, Caspar Luig, * * * and each and all of them and the attorneys, agents, servants and employees of them, and the attorneys, agents, servants and employees of each of them, be and they and each of them are perpetually enjoined and restrained and strictly inhibited from diverting any of the water of Silvies river and any of the water from the east fork of Silvies river and any of the water from the west fork of Silvies river from the channels of said rivers and from the channels of each of said rivers, and that they be and they and each of them are perpetually enjoined and restrained and strictly inhibited from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described as the said water has heretofore been wont to flow thereon when not interfered with by the said defendants and by the said intervenor, either jointly or severally, and that they be and they are and that each of them be and he is required to remove all and any dams which they or either of them may have, or which any one of them may have, in the channels of Silvies river or in the channels of the east fork of Silvies river or in the channels of the west fork of Silvies river, and that they be and they are and that each of them be and each of them is hereby perpetually enjoined and restrained and strictly inhibited from rebuilding the same, or any thereof; and that they be and they are and that each of them be and each of them hereby is perpetually enjoined and restrained and strictly in-

hibited from in any manner obstructing the flow of the waters of Silvies river and from in any manner obstructing the flow of the waters of the east fork thereof and from in any manner obstructing the flow of the waters in the west fork thereof, and from obstructing the flow of the waters of said rivers, or any thereof, in all and in each of the channels thereof, save and except as is in this decree more particularly set forth.

"20. That this decree shall run in favor of the complainant, its successors and assigns, and against the defendants, their heirs, personal representatives, successors and assigns, and against each of the said defendants and the heirs, personal representatives, successors and assigns of each of said defendants; and against the complainant, its successors and assigns and in favor of the said defendants, their heirs, personal representatives, successors and assigns; and that the waters of Silvies river and the waters of the west fork of Silvies river and the waters of the east fork of Silvies river and the waters in any of the channels of said Silvies river and in any of the channels of the east fork thereof and in any of the channels of the west fork thereof may be used and enjoyed by the defendants only as in this decree is particularly set forth, and not otherwise, and only at the times and in the places and for the purposes in this decree set forth, and not otherwise."

Object of Decree.

It will be seen that by this decree the defendants were not given any particular amount of water, but that they were permitted to maintain certain dams and certain ditches and to operate the same at certain specific times, and that they were forbidden to operate them at other times or to otherwise take or divert or obstruct any of the water of the river. The general plan of the decree was

that from the breakup in the early part of March until the early part of May the defendants should not obstruct the flow of the water, but should let it flow freely down to complainant, receiving only the natural overflow or the amount that would run into their ditches without any dams until the particular dates mentioned in May. The only other limitation put on the defendants was the particular land they might irrigate and the particular dams and ditches which they might use for that purpose. It will be seen, therefore, that the decree was largely in the nature of a regulatory decree, the idea being that the complainant would get the bulk of its water during the spring floods between the first of March and the early part of May.

Change of Parties.

Since the entry of that decree the following changes have occurred as to the parties: Henry Luig succeeded to Caspar Luig; Carey Thornburg has succeeded C. H. Voegtly and William Hanley Company has succeeded to the rights of W. D. Hanley (being the same person as William Hanley referred to in these proceedings and who is the president of the William Hanley Company, Appellant's Printed Record, p. 29).

Violations of Decree.

It being obvious, therefore, under the terms of this decree, that the complainant was entitled to the unobstructed flow of the water of the river as against the above named parties during the month of March and April, 1915, except to the extent that the water might

flow unobstructed therefrom through their ditches, we proceed to show the manner in which the decree was attempted to be ignored and was violated by the defendant W. D. Hanley, and others, acting with him. In substance this was accomplished in the following manner:

The river in that year, during the ordinary flood period was very low, being only between 130 and 650 feet per second, whereas the years before it was between 300 and 1700 feet (Appellee's Printed Rec., pp. 7-8). By the first of May the river was down to about four hundred and twenty-eight (428) second feet. During the period the complainant was practically without water for the irrigation of its lands, and at times did not even have water for cattle. (Appellant's Printed Rec., pp. 172-4, 156. Appellee's Printed Rec., pp. 60-1). Things being in this condition the defendant Hanley in violation of the decree put all of the boards in the Luig dam and diverted all of the water of the west fork of the river, amounting to 46 second feet, with the exception of about four feet, which went around the dam (Appellee's Printed Rec., pp. 8-9). Above this, on the same fork, the same defendant, W. D. Hanley, claimed to have acquired an interest in the Young dam, and this dam was diverting one and eight-tenths (1.8) feet of water of the river (Appellee's Trans., pp. 9-10). At the same time, the People's Ditch, on the same fork of the river was open, in violation of the decree carrying four and three-tenths (4.3) second feet (Appellee's Printed Rec., pp. 14-15), and while the owners of the ditch denied that they had opened it and the defendant W. D. Hanley admitted that he would have used it if he had seen fit, no satisfactory proof could be offered on the hearing as to who was responsible. Then Thornburg,

an employee of Hanley, built a new dam in section thirty in admitted violation of the decree and while Hanley denied any part in this, admitted the dam was "friendly" to him. (Appellee's Printed Rec., p. 69). On the east fork of the river, the Hanley drain ditch was opened up as late as April 8th, diverting thirty (30) feet of water (Appellant's Printed Rec., pp. 93-4). The Hanley upper ditch was open during the same period and up until the 3d of May, carrying forty (40) second feet (Appellant's Printed Rec., p. 94), and this was being diverted by one board in the Hanley dam and brush against the same, which had been cut and put against the same (Appellant's Printed Rec., pp. 95-6). Going on down through the Hanley property on the east fork, the water was further diverted by "breaks or cuts in the banks; that is, they had the appearance of being cut" (Appellant's Printed Rec., p. 97). The first one was one thousand (1000) feet above the drain ditch and diverted fifty (50) second feet of water. The next one was nine hundred or one thousand feet below the drain ditch and diverting fifty (50) second feet of water. Below that another was taking 5½ or 6 second feet of water.

> "And then in section 35 there was another cut, or a ditch rather, taking out there, that the boards had been in. It was in very bad shape, and was taking about five second feet of water."

And beside these, there were numerous smaller ones that were not measured. (Appellant's Printed Rec., pp. 97-98). Below this, and in section 3, all the balance of the water of the river was diverted by another dam in that section (Appellant's Printed Rec., pp. 98-99). This last diversion was not made the subject of this contempt

proceeding. It will thus be seen that by these various methods the defendant was during this period taking practically all of the water of both forks of the river.

We will now proceed to show that each of the diversions complained of was in violation of the decree, and that the attempted justification thereof was without any foundation in law or fact.

I.

THE LUIG DAM WAS DECREED TO BELONG TO LUIG AND WAS ENJOINED BEFORE MAY 15th, AND WHETHER HANLEY THEN HAD, OR SUBSEQUENTLY ACQUIRED AN INTEREST THEREIN, IT WAS SUBJECT TO THE DECREE AND ITS OPERATION IN VIOLATION THEREOF WAS A CONTEMPT.

The decree, in the original case, found that this dam belonged to Luig, and he was permitted to use it at certain times only for the irrigation of certain land. The defendant W. D. Hanley put in no claim to it, or any right to irrigate any land by it, or any right to irrigate any land from the west fork of the river. He now claims that he owned it long before the original suit was commenced in 1899 or the final decree was entered in 1901, and the District Court held, first: that his claim of ownership was apparently without any foundation whatever, and, secondly, if he had any ownership or right in it it was his duty to set it up in the original case, and not having done so, he is barred from doing so at the present time, and from operating it at times not permitted by the decree. The testimony on this subject was as follows:

John Gilcrest, superintendent of plaintiff, testified that every year he went up and down the river to see if the

dams are in at any time they should not be in according to the decree, and that he had never known the Luig dam to be used for irrigating prior to the time permitted by the decree until the year 1915 (Appellant's Printed Rec., pp. 161-2).

Ben Newman, foreman of the plaintiff, testified that every year he went up and down the river for the purpose of ascertaining whether any dams were in during the time that the decree provides that the river shall be opened, and prior to the year 1915 he had never known of the Luig dam to be maintained in the river prior to the time allowed by the decree (Appellant's Printed Rec., p. 174).

The witness *Henry Luig* testified in regard to this dam as follows: The original Luig dam was put in by Sam Voegtly in 1886. The Luigs got it 2-3 years after. From that time until the death of Caspar Luig the Luig brothers used it, and since Caspar Luig's death Henry Luig used it. The new dam was put in in 1904, 1905 or 1906, and that was when Hanley first got an interest in it. (Appellant's Printed Rec., pp. 310-313).

The same witness further testified that neither himself nor Hanley had ever prior to the year 1915 operated the dam, excepting during the time allowed by the decree. His testimony on this subject was as follows:

> Q. Now, Mr. Luig, ever since you have had charge of the property, you know when you put the boards in. What time of the year?
> A. The 15th of April.
> Q. The 15th of May, isn't it?
> A. The 15th of May—about there, yes.

Q. Do you ever put the boards in before the 15th of May? A. Hanley fixed it.

Q. *Have you ever put the boards in before the 15th of May?* A. *No, I believe not.*

Q. Do you know when Mr. Hanley put the boards in the dam this year? A. No, I don't.

Q. Did you ever let him do that before?

A. I don't know.

Q. *Well, did you ever let him do it before this year?* A. *No, I didn't.*

Q. *Well, did he ever do it before this year?*

A. *No, he never done it.* (Appellee's Printed Record, pp. 155-6).

In the affidavit of Hanley in the contempt matter he states:

"The said dam was originally constructed by Peter Stenger for the purpose of irrigating section 31 from the waters of Silvies river, which section Stenger at that time had under lease from Charles Altschul, forming a part of what is known as the old Wagon Road Land Grant, and neither Stenger as lessee of said section nor Altschul as the owner thereof were parties to this suit, nor to the decree in question. I succeeded to Stenger in the lease of said section in 1898, according to my present belief, *but at any rate before the commencement of this suit and before the entry of this decree*, and succeeded to Stenger's interest in said dam in section 31 for the purpose of irrigating said section 31, and as before stated I was not made a party to this suit as lessee of said section 31, nor was Charles Altschul, the owner in fee simple. On July 1, 1903, the said section 31 was sold by the said Charles Altschul, by mesne conveyances, to the William Hanley Company, and during every year hereinbefore mentioned, towit: from the time of the Peter Stenger lease long before this suit and this decree, the said dam has been used by the lessees or owners of section 31 for the irrigation thereof without the intermission of a single season until the present time. That about the time I ac-

quired the lease of section 31, *and certainly long before the commencement of this suit or the entry of this decree*, I constructed a new dam in the place of the old Stenger dam, which new dam is the dam here in question and which was referred to in the decree. Caspar Luig, the predecessor in interest of Henry Luig, *assisted* in the construction of said new dam *and was by me allowed*, in consideration thereof, a joint interest in said dam for the purpose of watering his holdings in section 6, particularly described in the complaint and the decree, towit: The east ½ of the SW¼ and lots 6 and 7 and the SE¼ of the NW¼ and lots 3, 4 and 5, all of section 6, T. 24 S., R. 31 E.; and the said Luig also used said dam for the purpose of diverting water to irrigate other lands not mentioned in said decree and as I am informed and believe and so state and according to the best of my recollection such dam has so been used every year ever since said construction, prior to the decree, without intermission. I, therefore, state to the court under oath, as a purgation of the alleged complaint that in ordering the said Carey Thornburg to put the boards in said dam as charged in the first article of the complaining affidavit, I did what I had been doing continuously *long prior to the decree* and under the belief, as advised by counsel, that my right so to do and my right to continue to irrigating section 31 was a right of the William Hanley Company as successor in interest to Charles Altschul, the owner of section 31, and was in no wise affected by said decree." (Appellant's Printed Rec., pp. 33-4).

Mr. Hanley's testimony on this subject was as follows:

"Mr. Hanley, by the first article of the information against you in this proceeding, you are charged with aiding and abetting Henry Luig in taking water out of the west fork of Silvies river by means of what is known as the Luig dam, here so called, being in section 31, township 23 south, range 31 east, from the 15th of May till the 1st of July—no, about the month of April of this year. I wish you would state

whether you conspired with Luig or anybody else in this matter, or what interest Luig had in it?

A. I haven't seen Mr. Luig only about once in three or four years. I got some cattle of him this spring, but as far as this dam is concerned, he had nothing to do with putting the boards in and closing it up. This is not a Luig dam, it is the real 31 dam, and belongs to 31. Mr. Luig's right in this dam commenced, I would say, about 1900, that they helped me construct the present dam that is in there, as a matter of accommodation, additional right to the dam that they had down at their place. They had a dam at their house, about half way through Section 6, I think is where the Luig dam really is.

COURT. This dam then is your dam and not Luig's? A. Yes, it is the 31 dam.

COURT. *Did you claim it was your dam at the time?* A. *Well, I claim it now as my dam as the William Hanley Company, as the owner of* 31.

COURT. Section 31.

A. This dam originally, the construction of a dam in 31 commenced back in the latter part of the eighties.

Q. Who built it first? A. Pete Stenger built the first dam on 31.

COURT. Was that prior to this litigation?

A. Prior. About 1887, I think it dates. The litigation commenced, the commencement of this was about 1900.

Q. And from the Stenger ownership to what ownership did it pass?

A. It passed to me under lease.

Q. Well, you mean the dam under lease?

A. The section.

Q. Pete Stenger had 31 leased, did he?

A. Had 31 leased.

Q. From whom?

A. From the Willamette Valley & Cascade Mountain Wagon Road Company.

Q. What was the purpose of building this dam?

A. It was to spread the water on 31 to irrigate it.

Q. Was that its original purpose of construction? A. Yes, sir.

Q. Well, now, to Stenger you succeeded, as succeeding to his lease? Did I understand right?

A. Yes, to his lease.

Q. Was this dam that is in question here today the same identical physical dam that was there originally?

A. No, it is not. It is further down than the original dam.

Q. Well, when was this one put in?

A. This one was put in, I would say, in 1898.

Q. Before the decree?

A. Yes, before any litigation.

Q. This dam was in existence at the time of the decree? A. Yes.

Q. When did Luig get an interest in using water diverted by this dam? A. In 1898.

Q. For what consideration?

A. *Oh, just as a matter of assisting me in putting it in.*

COURT. How much of his land is watered from that diversion.

A. Why, I never followed that out in detail. As a matter of fact, he could irrigate all of it from it, because it would be above it. The gravity would irrigate all of it, but I wouldn't say how much of it does actually irrigate, but I think practically all of it.

Q. Well, now, so far as this contempt is concerned, the putting in of those boards in the month of April you assumed the entire responsibility of?

A. Yes, sir.

Q. And exonerate Luig? A. Yes, sir." (Appellant's Printed Record, pp. 184-188).

On cross-examination he further testified as follows:

"Q. When was the time you first got the control of this dam in 31? A. I think in 1898.

Q. And Mr. Luig was also using it then, was he?

A. Mr. Luig assisted me in putting it in.

Q. That was the first you had anything to do with it, when you put in this particular dam?

A. We were re-putting in a dam which was above, known as the old Stenger dam, which was specially the 31 dam.

Q. You put in a dam, as I understand it, at the very point where this dam is now, in Section 31, in 1898. Is that what I understand you to mean?

A. In 1898, I say that from memory.

Q. You say there had been an older dam at some other point? A. Yes.

Q. Where was that? A. It was above.

Q. How far above? A. Oh, a quarter of a mile.

Q. A quarter of a mile?

A. Between a quarter and a half, probably.

Q. That would be up very close—it is in the same section? A. All in the same section, yes.

Q. That had washed out, had it, or what?

A. Washed out.

Q. And which Mr. Luig helped you put this dam in, or which Mr. Luig did you help put it in, whichever it was? A. Caspar and Henry.

Q. They both worked on it, did they?

A. Partially.

Q. Had they had anything to do with the Stenger dam before that? A. I don't know as they had.

Q. Your understanding was that they had not, as I understand it?

A. Well, I would say that probably they had, and probably they had not.

Q. How did they come to help you, or how did you come to help them, whichever it was?

A. At our own initiative and suggestion that we put it in. I think that Caspar Luig that year rented the northeast quarter of Section 28, and he was rather a frequent visitor at the Belle-A Ranch, and we put it in that spring temporarily.

Q. You understood that he claimed a right there to the whole dam?

A. Yes, I understand that he has a right there.

Mr. Wood. You are talking about the old Stenger dam now? A. Well—

Mr. Wood. He is talking about the old Stenger dam.

A. I would put that more this way: that pretty near any of the neighbors that wanted a right, or an interest in any of those things, why, they could always have them.

Q. Was there any dam at this point where this new dam was put in, at the time you put it in?

A. No, there was no dam there then.

Q. Didn't you say in the opening of your testimony—

A. I don't know, Mr. Treadwell, but what maybe the first dam that we put in was higher up than where the present one is. I wouldn't be right sure.

Q. Have you rebuilt it since? A. Yes.

Q. When did you rebuild it?

A. I think probably the second year after we put it in.

Q. What year do you think that would be—about 1900? A. 1899.

Q. Well, didn't you say in your opening testimony that Mr. Luig had no interest in this dam until 1900?

A. Well, I don't know, Mr. Treadwell, *but Mr. Luig only has a neighbor's right in it.* That dam belongs to section 31.

Q. Well, I am asking you what you testified to. Didn't you testify, when you started off your testimony, about this Luig dam, that Mr. Luig's interest in that dam dated from 1900?

A. Well, I think Mr. Luig's interest in it dates earlier than that, because whenever we did do the first work, why he had an interest in it.

Q. You also think that he had an interest before you did the first work, in the old dam that you were replacing?

A. Oh, no. That dam serves two sections, you know, 31 and 5 is served from that dam.

Q. At any rate, your statement here that his first interest was in 1900 is not right? Is that right?

A. Well, I wouldn't say that, Mr. Treadwell. Whenever we done the first work together, Mr. Luig had a neighbor's interest in that dam.

Q. When did you rebuild it again, if you have rebuilt it since? A. No, no.

Q. So it was there in 1898? Then you rebuilt it again in 1899 or 1900? Is that as I understand?

A. Somewhere along there. I may be a year behind on my first statement.

Q. You know, don't you, that Mr. Luig all this time has been operating this dam under this decree, ever since that? A. No, Mr. Luig has not.

Q. He has not? A. No.

Q. Mr. Luig has never touched the dam, I suppose? A. Oh, he probably has.

Q. He probably has, or probably hasn't—which is it?

A. We haven't been restricted with this dam, and we haven't had any special time of putting it in. This dam has been put in by us, whenever we wanted to put it in.

Q. *You mean to say, Mr. Hanley, that ever since this decree has been entered, you have absolutely disregarded the decree as to this Luig dam?*

A. *Every year, Mr. Treadwell.*

Q. Every year? A. Every year.

Q. You just simply and absolutely disregarded the decree altogether?

A. Every year that dam has been put in by us, and it has had no care about dates. Now, it might have went some years way over—I don't know—because I have never given an order that this dam was under the decree at all.

Q. What land did it irrigate since that time?

A. 31 and 5. Now, I think to clear this thing up a little—

Q. You can't clear it up with me, Mr. Hanley, the least bit, except by answering my question.

A. Maybe I can with the court, Mr. Treadwell. I have a reason for disregarding that. I have a reason for disregarding it.

Q. I am asking you this question, Mr. Hanley: It irrigated the lower part of section 31 and section 6, did it not? Isn't that a fact? A. Yes.

Q. And section 5? A. Yes.

Q. You also own Section 5, don't you? A. Yes.

Q. We will come to that in a moment. Now, this dam is in very low, away down in the lower part of Section 31, is it not? A. Pretty well down, yes.

Q. About how much of Section 31 does the water that floods out from that dam irrigate?

A. Oh, that dam affects 31 two-thirds of the way up.

Q. Who operated the dam since the decree in this case? Who put the boards in?

A. Well, I wouldn't want to go back further than Mr. Thornburg, without giving it a little special thought.

Q. How long has Mr. Thornburg been employed by you there?

A. I would say just off-hand, about four years.

Q. About four years. And before that did you have anything to do with it at all? A. Oh, yes.

Q. Well, who operated the dam then?

A. I will try to work up that detail, if I will be given a little time.

Q. You can't work it up better than right now, for me, Mr. Hanley. A. Well, I haven't got it.

Q. Have you ever put those boards in that dam before this year yourself, outside of the time permitted by the decree?

A. Well, now, Mr. Treadwell, I will tell you. It has been a long time since I put in any boards, or did any such work.

Q. Well, you can answer that yes or no. We will get the rest of it?

A. I would say no.

Q. Have you ever been there and ordered it done before this year? A. Yes.

Q. Now, what year did you do that?

A. You mean right at the dam?

Q. Yes. A. Right at the dam?

Q. Yes, or that you know that the boards were put in at any time when it was not permitted by this decree?

A. Well, I don't know, Mr. Treadwell, that I can state any specific time. I have given an order on this dam that is regardless of any decree.

Q. You specifically told your people to disregard the decree so far as that dam was concerned?

A. No, I have not, no, sir.

Q. I want to know what you mean? A. No, sir.

Q. What did you tell them?

A. The only object in putting it in would be if we need water.

Q. What you are telling the court is that that dam has been used every year during the time that it was prohibited specifically by the decree in this case?

A. Well, that dam has been used every year, Mr. Treadwell—every year since the decree, and before.

Q. Why, sure. We all know that, Mr. Hanley.

COURT. That is again indefinite. I should think the time—

Mr. TREADWELL. Yes, the time is the whole thing.

Q. There is no question about this dam being used, Mr. Hanley, every year. I am asking you, has this dam been used before the time the decree permitted it to be used, on the 12th of May or the 15th of May, I believe it is, by this decree? That is what I am asking you.

A. *Well, I am not prepared to state right now, Mr. Treadwell, but I will say this to make it plain, that I did order the boards put in this year.*

Q. I know you did this year. A. Yes.

Q. But outside of this year, you wouldn't say that anybody violated this decree in regard to that dam? A. Oh, my, yes.

Q. You would? A. Yes.

Q. Well, now, who?

A. The violation, if it was not technical, it was in other way that we have been under the impression —that I have personally been under the impression

—and would give an order any time that we would put in the boards in the dam any time that we wanted water.

Q. *I am asking you the question: Can you state any person that ever put the boards in that dam before the time permitted by the terms of that decree, excepting this year?*

A. *Well, I won't state it now, Mr. Treadwell.*

Q. *You can't state it now, can you?* A. *No, sir.*"

(Appellant's Printed Record, pp. 222-230).

It will be seen from this testimony that Gilcrest, the superintendent of plaintiff, Newman, the foreman of the plaintiff, and Luig, the owner of the dam, all testified that this dam had only been used in accordance with the decree until the year 1915, and that when the witness *Hanley* was finally pressed he was unable to testify that the boards had ever been put in the dam before that time in any year except that year.

Hanley now claims that he was a tenant of section thirty-one (31) from 1898 to 1903, when the William Hanley Company became the owner of the land (Appellant's Printed Rec., p. 33), and that ever since it has been the owner of the land and claims that he acquired his interest in this dam while a tenant in 1898. He set up his right as tenant in land on the *east* fork (Appellant's Printed Rec., p. 5), but did not set up any right in this dam. If he had any right in this dam acquired while lessee, such right was his own property and not the property of the owner of the land, and he was entitled to set it up and have it protected, and it is doubtful whether such a right

ever became appurtenant to the land or the property of the owner of the land.

Smith v. *Duff*, 23 Mont. 65, 24 Mont. 30;

Cooper v. *Shannon*, 36 Colo. 98, 85 Pac. 175, 111 L. R. A. 95;

Sayre v. *Johnson*, 33 Mont. 15; 81 Pac. 329;

Seaward v. *P. L. S. Co.*, 49 Or. 157, 88 Pac. 963;

2 Kinney on Irr. & Water Rights, Sec. 689.

If he failed to set it up he would be barred as tenant from asserting it.

Josslyn v. *Daly*, 15 Idaho 137; 96 Pac. 568.

The evidence showed that the so-called Stenger dam was half a mile further up the river than the Luig dam, although Hanley tried to make it appear that Stenger built the Luig dam, and Luig testified that Hanley had nothing to do with the Luig dam until after the William Hanley Company purchased section thirty-one (31) (Appellant's Printed Rec., pp. 311-12). From the time of the decree until 1915 the dam was operated in accordance with the decree according to all the witnesses. Under these circumstances, the court was fully justified in holding that his claim of title to this dam prior and superior to the decree was without any substantial foundation, and that any right that the William Hanley Company has it got by helping in the reconstruction of the dam in 1904, and that it therefore took its interest subject to the decree.

Ahlers v. *Thomas*, 24 Nev. 407; 56 Pac. 93;

Lake v. *Superior Court*, 165 Cal. 182;

Batterman v. *Finn*, 34 How. Pr. 108;

State v. *Dist. Court* (Mont.) 86 Pac. 798.

Moreover, if Hanley did acquire any interest in the dam before the decree, and the owner of the land subsequently obtained that title, it obtained it from Hanley, and if Hanley's title was subject to the decree by reason of the fact that he was a party to the suit, it remained subject thereto when it passed to the owner of the land. This entirely distinguishes the case from the case of

Josslyn v. *Daly*, *supra*.

In that case the original water right was acquired not by the tenant, but by the owner of the land, and it was sought to bind the tenant who subsequently became owner, by a judgment against him, while tenant. It would be ridiculous to say that the landlord would get a better title to an improvement, such as a dam, put upon the land by the tenant, than the tenant himself had, and although the tenant held his title thereto subject to agreement or decree, that the landlord by operation of law would succeed to it free of such limitation.

II.

THE YOUNG DAM COMPLAINED OF IN THIS CASE WAS BUILT AND OPERATED IN VIOLATION OF THE DECREE AND ANY INTEREST THAT THE DEFENDANT HANLEY HAS IN IT HE ACQUIRED WITH THE KNOWLEDGE THAT IT WAS SO BUILT AND OPERATED.

It will be noted that the decree permits the maintenance of the Young dam for the joint use of the Young property, the Hotchkiss property and the Voegtly property (now the Thornburg property). The dam referred to in the decree was situated about one thousand (1000) feet south

of the north line of section thirty, whereas the ditches above it took out near the north line of section thirty. It appears that in about the year 1907 George W. Young abandoned the old dam and constructed a new dam on the north line of section 30 and this matter became the subject of a contempt proceeding against him, which Judge Bean decided the first day of April, 1912, and in his opinion Judge Bean said:

> "There is another feature in reference to Young's conduct that ought not to pass unnoticed, although it is not specifically charged as a violation of the decree in the petition filed. His dam went out in 1907. About that time or shortly before he built another dam at the expense of Hanley near his north line and some distance above the old dam, and constructed a new ditch along his north and east line and onto section 29, throwing the dirt therefrom on his side of the ditch, making a levee or embankment to prevent his land from being overflowed. He used a part of the water through this ditch for irrigation and permitted the remainder to go down to Hanley's land, and this he clearly had no right to do under the terms of the decree. He claims that since the decree he has changed the character of his cultivation and uses only about 25 per cent as much water as he did at the date of the decree, and he seems to think he had a right to permit Hanley or some one else to use the remainder without violating the decree. But, as already stated, his rights are defined in the decree. By it he is not entitled to any definite quantity of water but only sufficient to irrigate the described lands, and if by reason of a change in the character of his cultivation he now uses less water than he did at the date of the decree, he must let the surplus go down the stream as it is wont to flow, and cannot permit its use by another without violating the decree." (Appellant's Printed Rec., p. 336).

The defendant *Hanley* in his affidavit filed in answer to the order to show cause herein made the following statements in regard to the Young dam:

"II.

Answering paragraph II of the complaining affidavit, I say as before that I have never had any conversation with George Young, Hull Hotchkiss, C. H. Voegtly, or any of them, as to their management of the dam referred to in the affidavit, or diversion of water from Silvies river this year, and have neither directly nor indirectly encouraged them to any violation of the decree, or to any act whatever in the premises. That while I wish to be emphatic in the foregoing statement that I have neither directly or indirectly, nor by advice or encouragement, taken a drop of water from Silvies river this year by said Young dam, I wish to be entirely frank with the court and state that I consider myself the actual owner of said dam by purchase from Young, and I purchased said dam for the purpose of using it to divert water from the river to irrigate section 29, and section 29 stands in exactly the same category and relation as section 31 referred to in the preceding article, namely, it is a Charles Altschul or Wagon Road section, which was in no way involved in this suit or this decree, and has since this decree by mesne conveyances been acquired by the William Hanley Company. *That until yesterday, the 29th day of April, 1915, when the complaining affidavit was served upon me in Portland, Oregon, I had no knowledge of the Geo. W. Young contempt proceedings, or that he had been ordered to remove said dam or purge himself of contempt by paying costs.* I am advised by counsel that the said decree in the contempt proceedings against said Young does not specifically require said Young to remove said dam, but only to refrain from obstructing the flow of the river except as permitted by the decree, and to pay costs. *However, to make this point absolutely clear, I wish*

> *to repeat that though I purchased the Young dam in good faith and in entire ignorance of any decree against it or Young*, I have not used it, nor incited anyone to use it, and did not know it had been used this year." (Appellant's Printed Rec., pp. 35-36).

It will be noticed by this that Hanley there claimed that after Young had built the dam he, Hanley, had purchased the same from him, *and at that time he had no knowledge of the contempt proceedings against Young, that he purchased it in good faith, and in entire ignorance of any decree against it or against Young.* When as a witness, however, Hanley testified just to the contrary and admitted that when he purchased it Young told him "that he had been held for contempt." His testimony on the subject was as follows:

> "Mr. Young said that he had got some hay from me and that he was going to take it out, and if I would square off his hay bill, that he would turn me over his interest in the dam, that he didn't expect to use it any more, *that he had been held for contempt*, or something about it, but he said if I didn't take it, why he would take it out. So that I squared off his hay bill, and taken his interest in the dam." (Appellant's Printed Rec., p. 189).

On cross-examination he further testified on the same subject as follows:

> "Q. Now, as I understand it, this statement in your affidavit is entirely unfounded where you state that until yesterday, the 29th of April, 1915, when the complaint was served upon you in Portland, Oregon, you had no knowledge of the George W. Young contempt proceeding, or that he has been ordered to remove said dam, or purge himself of contempt by paying costs? That is not so at all, is it, that portion of your affidavit?
>
> A. It is not so.

Q. No, I say that is not true there? You don't contend it to be, do you?

A. I want to be understood as saying that I did understand that Young was held for contempt of court.

Q. I just want to get the record clear. You state now that that is not right?

COURT. I understand now you made a mistake in that affidavit?

A. Yes, sir; in the allegation, I didn't aim to say that I had no knowledge of the Young contempt." (Appellant's Printed Rec., p. 236).

When Young, however, took the stand he testified that he built the dam in 1907 and Thornburg made a ditch taking out above it and Young built a flume connected with it, and also constructed a ditch connected with it on the opposite side of the river, and that he built it with the intention of using it and tried to use it (Appellee's Printed Record, pp. 97-106); that he gave Hanley the privilege of connecting with it (Appellee's Printed Rec., p. 106), and that some of Hanley's men assisted him in building it (Appellant's Printed Rec., p. 302), and that he made his deal with Hanley with regard to it before the previous contempt proceeding (Appellant's Printed Rec., pp. 304-5). After this testimony Hanley again took the stand and gave an entirely new version of the matter, as follows:

"Mr. Hanley, in your affidavit is a statement that you didn't know of the contempt proceeding against the Young dam when you purchased it. Then you took the stand and, as I understand it, you testified that you knew, in a general way that there had been contempt proceedings. Then you said that you had taken over Young's interest in the dam, or some hay account. Now, I understand from Mr. Young's testimony that you took over the dam earlier than that,

and before the contempt proceedings. Having heard him, is your memory refreshed so that you can state anything more definitely about the facts?

A. Mr. Young said that I had taken it over in 1909, and refers me to Mr. Billie Miller, my attorney at the time, that he had taken a bill of sale, and there is a bill of sale of it recorded in the records of the county clerk's office at Burns. Now, I would say that I want the court to understand that my interest in that dam is for Section 19, and the rights that I claimed for Section 29. They corner with one another. And in the part of constructing it, why, I guess probably I had an interest in it. But at any rate, I had paid a matter that Mr. Young had told me, and refreshed my memory on it, and that was some money that he was owing on the lease of Section 29, that I had paid that. And I remember paying that to the Road Company, and probably in my hay statement, that was an overplus of another payment, and I probably put in something when the dam was constructed. But the dam was moved up to Section 19, and the rights in there I claim for Sections 19 and 29, I claim for the Harney Valley Improvement Company." (Appellant's Printed Record, pp. 307-8).

It will be seen from this that Hanley made three different and distinct explanations about this dam, and the court, of course, was at liberty to accept any one of them that it saw fit. But however it may be, it appears that this dam was built by Young in place of his dam which had gone out, and built at a place where he was not entitled to build it, and in a manner that diverted water into the Hotchkiss ditch that was not permitted by the decree, and whether Hanley originally assisted him in doing this or, after he had been held in contempt for doing it, attempted to purchase it from him, he was in either event assisting in a violation of the decree of the

court against Young, Hotchkiss and Thornburg, and the case was a clear case of Young having been found in contempt when building the same, attempting to avoid both the contempt and the necessity of removing it by passing it over to Hanley. It is too clear for argument that this dam having been constructed by Young for his own purposes in violation of the decree of the court, and this being known to Hanley, who was a party to the suit, that he could acquire no rights in and to the same, and the court therefore properly required Young to remove it, and Hanley to desist from using it. It is obvious that a person cannot build a dam in violation of a decree and then transfer it to another to escape the consequence, nor can such transferee escape liability for a violation of the decree by its subsequent maintenance.

Ahlers v. *Thomas*, 24 Nev. 407; 56 Pac. 93;

Lake v. *Superior Court*, 165 Cal. 182, 193; 131 Pac. 371;

Batterman v. *Finn*, 34 How. Pr. 371;

State v. *Dist. Court* (Mont.), 86 Pac. 798.

THE ORDER APPEALED FROM DOES NOT INTERFERE WITH ANY NEW RIGHT OF PROPERTY WHICH HANLEY MAY HAVE ACQUIRED SINCE THE DECREE; IT SIMPLY UPHOLDS THE DIGNITY OF THE COURT BY INSISTING THAT ITS DECREE RESPECTING THESE PARTICULAR DAMS CANNOT BE EVADED OR THWARTED BY ANY PARTY TO THE SUIT WHO THEN HAD OR HAS SINCE ACQUIRED AN INTEREST THEREIN.

The decree to which Hanley was a party having expressly forbidden the operation of either of these dams prior to the 12th day of May, and the 15th day of May,

respectively, a violation of that decree by any person having notice thereof whether a party to the decree or not would constitute a contempt.

United States v. *Debs*, 64 Fed. 724, 755;

Ex parte Sticking, 40 Ala. 160.

Nor is any question involved in this case regarding any new and independent water right which any party may have acquired since the decree was entered. If Hanley has since the decree acquired any new and independent water right for new land which he did not own at the time of the decree, there is nothing in the order herein appealed from which in any way affects such right. But such rights must stand on their own bottom. If by appropriation, they must be based on application to the state engineer. But these particular dams having been dealt with by the decree no right in them can be acquired contrary to its terms. For instance, the evidence is undisputed that the water from the Luig dam went all over the Luig land. (Appellee's Printed Rec., pp. 9-10, 36-7), and the Young dam put water all over the Thornburg and Hotchkiss property (Appellee's Printed Rec., pp. 11-12, 36). It, therefore, results that by the simple artifice of saying Hanley put in the boards these parties can get their lands flooded in the very teeth of the decree. While Hanley was a party to the suit, even if he had not been, he would be bound to respect the judgment of the court and not thus thwart the purpose of the court.

> "'It is entirely consonant with reason, and necessary to maintain the dignity, usefulness and respect of a court, that any person, whether a party to a suit or not having knowledge that a court of competent jurisdiction has ordered certain persons to do or ab-

stain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and, as such, is and ought to be treated as a contempt of the court which issued the order.'"

Chisolm v. Caines, 121 Fed. 397, 400.

THE CLAIM OF HANLEY IN THE LUIG AND YOUNG DAMS WAS A MERE TRANSPARENT DEVICE TO ENABLE THEIR USE CONTRARY TO THE DECREE.

The Luig dam is in the extreme lower end of the Hanley land and the water diverted by it went all over the Luig land (Appellee's Printed Rec., pp. 9-10, 36-7). The water diverted by the Young dam went to the west onto the Hotchkiss and Thornburg land (Appellee's Printed Rec., pp. 11-12, 36), and not to the Hanley land and the only way that the water could get to Hanley's section 29 would be through the Young ditch and Young testified that he would not let Hanley use it (Appellee's Printed Rec., p. 104). Still Hanley says he had water from the Young dam for twelve years (Appellee's Printed Rec., p. 62), although he had before testified that he did not get an interest in it until after the contempt proceeding in 1912, and Young said Hanley got his interest in 1909, when it was constructed. His final testimony as to this dam was that Young constructed it and

> "I think probably that I was some party to it myself. That is, that I put in, but I am not just prepared to testify. These little minor matters slip away from me." (Appellee's Printed Rec., p. 62).

And both in his answer and testimony he denies using it at all in 1915 (Appellant's Printed Rec., pp. 35-6). It therefore appears that it was built in violation of the decree and used in violation of the decree by Young, Hotchkiss and Thornburg, was held to be in violation of the decree in 1912, and is again used in violation of the decree in 1915, and then comes Hanley and asks the court to protect the interest he obtained in it either when it was illegally built or after Young had been held in contempt for building and maintaining it.

> "A party to a decree adjudicating the right to certain waters and enjoining interference with such rights, is properly convicted of contempt for using more water than allowed under the decree, his claim being that he acquired the right to such use by deed from one not a party to the decree, *the evidence failing to show any right in his grantor, or that his claim is made in good faith, and it being found that his claim is a mere attempt to evade the decree.*"
>
> *Simpson* v. *Holbrook* (Wash.), 58 Pac. 206.

See also:

State v. *Lavery,* 31 Or. 77.

III.

WATER DIVERTED BY HANLEY TWENTY-ONE DAM INTO THE TWENTY-ONE DITCH BY MEANS OF THE TWENTY-ONE DAM AND OTHER OBSTRUCTIONS WAS IN VIOLATION OF THE DECREE.

The evidence in this matter shows that forty feet of water was diverted in this manner in April (Appellant's Printed Record, p. 94), and this was caused by a board and brush in the dam (Appellant's Printed Rec., p. 95),

whereas the defendant was not entitled to divert any water by means of the dam until the 5th of May. The court had a perfect right to believe the testimony that not only this board but the brush were deliberately placed in the dam as testified to by the witness. The evidence also showed that on the 4th of May, the day before the defendant was entitled to use the dam, all the boards were placed in the dam (Appellee's Printed Rec., p. 50). Further, as showing the intentional character of these obstructions, it appears the skeleton of an old bridge was permitted to fall and remain in the river on the Hanley property, causing the water to flow out of the river (Appellee's Record, pp. 26-27) and likewise boards with wires attached to them were permitted to lodge in the river with the same effect (Appellee's Record, p. 28), to say nothing of numerous dead cattle that were permitted to lodge in the river and help the work along (Appellee's Printed Record, pp. 29-31). Of course the defendant had lots of explanations for all of these obstructions, but the court was not bound to accept them, and the fact remained that during the months of March and April he was enabled by means of the Twenty-one dam and the board and brush cut and placed in the same to divert forty cubic feet of water, in clear violation of the terms of the decree.

IV.

THE KEEPING OPEN OF THE DRAIN DITCH AND THE DIVERSION OF WATER THROUGH THE SAME WAS IN CLEAR VIOLATION OF THE DECREE.

It will be noted by the final decree in the original case that defendant Hanley was permitted to use the drain ditch "for the purpose of draining water from the surface

of the land above described, and not for the purpose of irrigation." It appears that since the entry of the decree, Hanley having consistently left the drain ditch open and taken water at all seasons of the year, a supplemental suit was brought against him, which finally reached this court and is reported in *Pacific Live Stock Co.* v. *Hanley*, 200 Fed. 468. As to the matter of the drain ditch this court said:

> "With respect to the drain ditch, counsel for the appellant insist that it is and has been kept open by Hanley at all stages of the river 'draining even the stock water away from the complainant at the lower stages of the river,' and that it practically diverts the main body of the water of the east fork of the river at all times, except when the water of the river is high.
>
> Recurring to the original decree, we repeat the provision in respect to the drain ditch. After conferring, in its eleventh subdivision, upon Hanley the right to maintain his dam in the east fork of the river on section 21 and to divert such quantity of the water thereof at that point as is necessary for the irrigation of the lands therein specifically described, the original decree proceeds as follows:
>
> * * * * *
>
> Here is express authority for the maintenance of the drain ditch as then constructed from the east fork of the river extending southeasterly across the S. ½ of section 27 to the land of the complainant company at or near the S. W. ¼ of the S. E. ¼ of section 26, township 23 S., range 31 E., Willamette meridian, for the purpose of draining water from the surface of the lands of Hanley therein specifically described, and an express inhibition against the use by Hanley of any of the water of the drain ditch for irrigation purposes that is thereby taken from the river; the next clause of the same subdivision of the original decree providing, in effect, that at any time

the dam of Hanley in the east fork of the river on section 21 is open, and does not obstruct the flow of the water thereof, if 'from natural causes the waters of said east fork of Silvies river shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described (the dam on section 21) said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid, and during such time as the same may run thereon from natural causes and without obstruction of the channel of said river.'

It is manifest, therefore, that such overflow waters of the east fork of the river as may come upon Hanley's land while his dam is open and does not obstruct the natural flow of the river he is expressly given the use and enjoyment of, and while he is expressly inhibited from using the drainage ditch on section 27 for irrigation, or for any other purpose than of the drainage of the surface water from the specifically described lands, no other limitation is imposed in respect to the ditch or ditches through which he may use and enjoy such overflow waters from the east fork of the river.

The original decree, however, permits the maintenance by Hanley of his drain ditch for drainage purposes only and for the purpose of draining water from the surface of only certain specifically described lands of his. Beyond that limited purpose he is by that decree expressly enjoined from maintaining or using that ditch or any of the waters thereof; and it necessarily follows that neither Hanley nor his successors in interest have any right to thereby divert any water from the river when its waters are not so high as to make it necessary or proper by means of the drain ditch to drain surface water from the lands specifically described in the eleventh subdivision of the original decree.

That Hanley clearly violated the provisions of the original decree by subsequently constructing in the drain ditch a stopgate and an outlet or tapgate by means of which he used some of the waters of that ditch for irrigation is shown by the testimony of Hanley himself, as well as that on the part of the appellant. The claim on his part that such acts were committed with the consent of the appellant, and resulted in no injury to it, was presented to and considered by the judge who rendered the original decree when Hanley was cited to show cause upon that, and other grounds, why he should not be punished for contempt. Subsequent to those proceedings and long before the commencement of this suit, the evidence shows he removed the stopgate from the drain ditch, and never thereafter used any of the water of that ditch for irrigation, but the evidence fails to show that he ever has removed from the said ditch the outlet or tapgate, which he must be compelled to do.

A careful consideration of the evidence further shows in our opinion that Hanley has, notwithstanding the provisions of the original decree, kept, and continues to keep, the headgate of the drain ditch open at low stages of the water of the east fork of the river and at times when it was, and is, not necessary or proper to be kept open for the purpose permitted by the original decree, and in so doing has committed and does commit a clear violation thereof.

The defendant Hanley attempted to justify his diversion by the contention that by taking the water out of the river into the drain ditch and away from the complainant he was draining water from the surface of his land, for the reason that if he did not take it out it would overflow his land below the drain ditch. The insincerity of that claim was pointed out by this court in the language we have just cited, and the absolute lack of foundation for it is pointed out by the trial judge in this proceeding,

and the insincerity of the plea is pointed out particularly by reason of the fact that at the very times he was claiming to drain the river through the drain ditch for the purpose of preventing his land from being submerged, he was himself doing everything possible to submerge it to the extent of taking all of the water of both forks of the river; but, moreover, in this matter the defendant himself, by his own answer, has deprived himself of the possibility of contending that the diversion of thirty feet of water through the drain ditch clear up to the 8th of April could be justified on the ground that the land needed drainage at that time. In the affidavit filed in response to the order to show cause (Appellant's Printed Record, pp. 37-8), the defendant Hanley denied that the drain ditch was open after the *middle of March* and there is no suggestion made that after that time there was any flood condition which required the drain ditch to be kept open, and he followed up this affidavit by calling witnesses and attempting to prove that the drain ditch was not in fact open and did not in fact divert any water after the middle of March. Fortunately, we not only had the testimony of Mr. Griffing, who testified that it diverted water until the 8th of April (Appellant's Printed Rec., pp. 93-4), but we also had photographs taken by Mr. Griffing showing this diversion (see Exhibit No. 8, Appellant's Printed Record, pp. 99-100), and Mr. Griffing testified that this photograph was taken on the 8th day of April, and he did not even purchase the camera with which he took the picture until after the first of April; so that Mr. Hanley's statement that no water was diverted into the same after the middle of March could not be correct (Appellant's Printed Record, p. 100).

It therefore necessarily results that the trial court properly said in this matter, as this honorable court said in the former appeal, "that Hanley clearly violated the provisions of the original decree," and that "in so doing has committed and does commit a clear violation thereof" (200 Fed. 484-5).

V.

THE DIVERSION OF WATER BY CUTS IN THE BANK OF THE RIVER IS IN VIOLATION OF AND AN EVASION OF THE DECREE.

The injunction against diverting any of the water of Silvies river, except as permitted by the decree, is unlimited in its language, and applies to a diversion made "in any manner" (Final Decree, paragraph 19, pp. 1179-80). It is true that the decree permits Hanley to enjoy the water which from natural causes "shall overflow its banks." Hanley himself recognized that, however these cuts may have been caused, they could not be justified, nor could water flowing through them be said to be overflowing the banks. Thus, he said, that he had men working "with special instructions to keep those gaps closed up" (Appellant's Printed Rec., p. 200). He denied completely the existence of the cuts shown by the photographs and said that if there was any place where the water could run out in a channel it would merely be "some little nicks where it would cut, but I have no knowledge of any such a place being on the river; and if it were, why, it was just because it had broken itself out. * * * The man that was down there had full instructions to close them up and I have brought him here as a witness" (Appel-

lant's Printed Rec., p. 200). He further testified that if there were any shovel marks they were made by filling up instead of opening the cuts (Appellant's Printed Rec., pp. 201-2), and he stated that "we aim to use the river so it will work out *evenly on the top of the banks* and regulate the quantity of water that works over the bank" (Appellant's Printed Rec., p. 204), showing clearly that water running out through such cuts would not be considered as water "overflowing the banks."

The "banks" are the elevations of land which confine the waters to their natural channel when they rise to the highest point at which they are confined to a definite course and channel. (Kinney, Sec. 305). A cut or break in the bank cannot be the bank.

Hanley further testified that he had a man working along the river for the purpose of keeping the breaks filled up, and, referring to the picture showing one of them filled up with boards and manure, he stated it was very much exaggerated, and that that was only an emergency method of stopping them, and they had a better method which they used, namely, filling them up with scrapers (Appellant's Printed Rec., pp. 249-250), and so strongly did defendant admit his duty to keep these gaps closed that his counsel inquired whether we objected to his doing so (Appellant's Printed Rec., p. 256), and he also produced the witness *McLaren*, who testified that it was his duty to keep these cuts in repair, and went around with scrapers for that purpose (Appellant's Printed Rec., p. 277); and also the witness *Ryan*, who apologized for the method of stopping these shown in the photographs, which he said was merely a temporary structure, and ex-

plained how he closed them by putting poles across, and put in stack bottom to prevent the water from running out (Appellant's Printed Rec., p. 285-8), and he also testified to putting in boards for that purpose (Appellant's Printed Rec., p. 293), and that Mr. Hanley told him to close them up about the third or fourth of April (Appellant's Printed Rec., p. 295). The witness *Dave McLaren* attempted to give testimony to the same effect.

Again, *Hanley* testified that he closed all these cuts in the early part of April, and still a photograph was taken on April 20th, showing fifty feet of water flowing through one of them (Appellant's Printed Record, pp. 101-2). *Griffing* also testified that they showed evidence of design (Appellant's Printed Rec., p. 137), and that the water would not naturally wear them in the meadow sod (Appellant's Printed Rec., p. 138), and that he mentioned these cuts to Mr. Hanley's foreman, Mr. McLaren, and he said they "formed part of their irrigation system" (Appellant's Printed Rec., p. 139).

It is perfectly clear, therefore, from all of this testimony that the whole object of the defendant was to admit his duty to keep them closed and to establish that he had performed that duty, and that no water had gone out through them.

It is, therefore, very clear that Hanley himself recognized that, however, these cuts may have been caused, their maintenance was unjustifiable. While he attempted to establish that they were caused by water breaking through, of course, in view of the artificial operation of dams, ditches and irrigation works it would be pretty difficult to say what constituted a natural and what an

artificial break, and, for that matter, it is well settled that persons having rights on a stream are entitled to have even such natural breaks repaired and the river kept in its channel (Farnham on Water and Water Rights, sec. 489, et seq.). But Mr. Griffing testified that the openings had the appearance of being cut (Appellant's Printed Record, p. 97), and the photographs in evidence showing them controlled by stakes and manure show that instead of being permanently closed as they should have been, they were kept so that they could either be opened or closed at the will of Hanley. (See also Appellant's Transcript pp. 150-151.) Another one of these so-called cuts is described as a ditch (Appellant's Transcript, p. 97), and the photograph of it fully justifies that characterization.

Gilcrest testified that by these openings Hanley diverted water "in excess of any earthly necessity" (Appellant's Printed Rec., p. 164), and that these cuts "were not as the banks were originally. The sod was broken. There were openings there" (Appellant's Printed Rec., p. 170).

In connection with these cuts counsel refer to some testimony by a witness named Cronin, not contained in the printed record on this appeal, but claimed to be given in the trial of the original case, in which he refers to an opening in Section 34, and says he thinks it is a natural opening. That testimony not being part of the record on appeal, we have not got it before us, but it is sufficient to say that that is not upon the Hanley land and is not one of the cuts involved in this proceeding.

It is clear from this that the court was fully justified in holding that the manner in which these cuts were

operated was a mere evasion of the decree, and was a violation of the injunction which forbade the diversion of water from the stream in any manner whatever, except in the particular ditches authorized by the decree.

THE ENTIRE ATTITUDE OF THE DEFENDANT IN THIS MATTER SHOWED A DESIRE TO EVADE AND TRIFLE WITH THE COURT AND THE DECREE.

When this contempt proceeding was inaugurated and the order to show cause served, Hanley immediately came to Portland and had himself interviewed in the "Oregon Journal," in which he vilified the complainant, and, while he was taking all of the water of the river, he claimed that he was being harassed by "litigation in the United States courts" (Appellee's Printed Rec., pp. 44-46).

Although George Young had been held in contempt of court for constructing the new Young dam and flume connected with it, Hanley declared that it was an "outrage to cite the poor settler for contempt" (Appellant's Printed Rec., p. 231). He first attempted to deny that the court had ever entered any decree in the original case, but that it was only an agreement (Appellant's Printed Rec., p. 220). He talked about irrigating "these few acres" (Appellant's Printed Rec., p. 242), and then further on admitted that he owned ten thousand acres of land (Appellant's Printed Rec., p. 208), and attempted to make the court believe that he thought we were complaining because he shut up the drain ditch, although the records of this court show that we have been fighting because he keeps it opened (Appellant's Printed Rec., p. 239); claimed that he was entitled to keep the drain ditch open

so as to keep the water from overflowing his land, and still refused to improve the channel of the river so it would not overflow his land (Appellant's Printed Rec., p. 160). In his affidavit and answer to the order to show cause he complained because the complainant had never made any complaint to him with regard to the matters covered by the contempt matter, and that

> "if the facts were true the obstruction of the overflow of the river would be petty and immaterial, and nothing which could not be quickly remedied and removed without going into court by simply calling my attention to the matter,"

and that he did not have "the slightest suspicion that the complaints here charged in this affidavit were being harbored against me."

These allegations, all put in his affidavit evidently for public consumption, were made notwithstanding the fact that on the hearing he attempted to justify practically all of the things charged against him, and the evidence was without contradiction that before the contempt proceeding was inaugurated the matter was in great detail called to Mr. Hanley's attention (Appellant's Printed Rec., pp. 143-149).

Referring to such a matter as the taking of fifty feet of water, he says:

> "We haven't been *technical* about the use of the water in all those *little details;* but we haven't *taken* out the water at that place there that *naturally* would have run out, if we would have been technical about *trying* to get it out."

He first attempted to state that ever since the decree regarding the Luig dam "I have given an order on this

dam that is regardless of any decree," attempting to convey the idea that he had every year since that time used it at times forbidden by the decree, but when finally pressed the best he could say was that "I did order the boards put in this year" (Appellant's Printed Rec., pp. 228-229). This is a good deal like the boy who said he saw a thousand cats on the back fence, and on closer questioning finally brought it down to his cat and the neighbor's cat. In regard to the Young dam, in his affidavit and answer to show cause he specifically swore that he purchased it without any knowledge whatever of the contempt proceeding against Young, and then afterwards admitted that he purchased it because Young had been held guilty of contempt in respect to it.

As to the Luig dam, instead of belonging to Luig he attempted to contend that it belonged to him and that Luig merely assisted him in building it in 1898 (Appellant's Printed Rec., p. 187), while Luig testified that he and his brother had owned it ever since 1886 and Hanley had nothing to do with it until 1904. He even attempted to work out an interest in the People's Ditch (Appellee's Printed Rec., pp. 71-2), but later he admitted that he had no such right at all (Appellee's Printed Rec., p. 73), and he admitted that the water that went out through that ditch went to his land, and that he directed his foreman to use it for the irrigation thereof (Appellee's Printed Rec., pp. 70-72). Everyone who was interested in the People's Ditch denied that they had opened it.

The court was, therefore, fully justified in coming to the conclusion that Hanley's attempt at this late date to claim rights in the Luig dam was about as substantial as

his claim in the People's Ditch, and that it was simply made for the purpose of laying a foundation for a claim of water right for a lot of road land recently acquired by him; at any rate, none of his testimony was of such a nature as to require the court to believe it or follow it as against other testimony in the record.

THE DECISION OF THE TRIAL JUDGE AS TO THE FACTS IS CONCLUSIVE IN A CONTEMPT MATTER AND NOT SUBJECT TO REVIEW.

Bessette v. *W. B. Conkey* Co., 194 U. S. 234; 24 Sup. St. 665; 48 L. ed. 997.

The jurisdiction of the court below is alone subject to examination.

4 Ency. Pleading & Practice, p. 814.

MISCELLANEOUS MATTERS IN REPLY TO BRIEF FOR APPELLANT.

The foregoing brief anticipates and covers most of the matters referred to in the brief filed by appellant, but a few special matters therein deserve special mention:

1. Counsel state that the Luig dam was put in by Pete Stenger in the eighties. The evidence is not at all to that effect. The evidence is that Pete Stenger at some time in the eighties put in a dam on section 31, and that that was half a mile above the Luig dam. The Luig dam was put in first by Voegtly, and then in the eighties acquired by Luig, and, according to Luig's testimony, remained his undisputed property until 1904, when it was rebuilt and Hanley given an interest in it. How long the

Stenger dam remained in the river between the time it was put in the river and the time that Hanley acquired an interest in the Luig dam, in 1904, does not appear, but when the original suit was commenced and tried in 1899 and 1900 maps were introduced in evidence, which are on file in this court, showing all of the dams in the river, and this Luig dam is there shown, but no such dam as the Stenger dam appears, and it is, therefore, entirely consistent with the record to assume that the Stenger dam was a temporary matter; that it was out of the river for years and that Hanley first acquired his interest in the Luig dam about 1904, when it was rebuilt.

Counsel further attempt to contend that the Luig dam in section thirty-one is not the Luig dam mentioned in the decree. The decree locates the Luig dam in section thirty-one (Decree, p. 1153). The trouble is that the so-called Stenger dam is an entirely different dam from the Luig dam, which is involved in this proceeding.

2. Appellant claims that the water rights appurtenant to section thirty-one belong to the owner of that land and were acquired by the William Hanley Company, successor in interest of William Hanley (Appellant's Printed Rec., pp. 237-8), and were not involved in the original suit, and that even if Hanley's interest as lessee was involved, his interest as owner was not so involved. We in no way dispute this contention. Whatever *water rights* section thirty-one ever had appurtenant to it, it still has, but the question here involved is not the water rights of that land, which the court has in no way attempted to determine or interfere with, but the ownership of this Luig dam. There has been no evidence whatever

introduced showing any ownership of this dam appurtenant to section thirty-one prior to the entry of the decree in this case, and any right which either Hanley or the William Hanley Company obtained in that dam after the decree was acquired with notice of the decree, and held subject to its terms. In fact, the William Hanley Company by supplemental proceedings was made a party to this suit, and it is simply another name for William Hanley, and there is nothing in the record showing that C. E. S. Wood or any one else has any interest in it. That, however, to our minds, is an entirely immaterial factor. The court having dealt with this particular dam, and having had before it the owner of the dam, Caspar Luig, any interest subsequently acquired by the William Hanley Company, or any one else, is subject to its decree, and it is folly to say that the interest was not obtained from Luig. If he owned it and gave Hanley an interest in it in consideration of his helping to rebuild it, he did acquire his interest from Luig.

Counsel say that they could themselves build another dam for the irrigation of section thirty-one. Whether they could or could not with the permission of the State Engineer, they would not be entitled to build a dam for the irrigation of thirty-one *and then use it to put water all over the Luig land, in violation of the decree, and that is exactly what the use of the Luig dam did in 1915*, and if he did put in a new dam we would be entitled to have its use regulated by decree, so as not to interfere with our rights, but that is not what the appellant desires. He desires to get the benefit of the decree permitting this Luig dam to be used at certain

times, irrespective of our rights, and then also to use it at all other times, irrespective of our rights also.

Another point made by appellant in regard to this dam is that it was charged that he "encouraged, advised and *assisted*" Luig in putting in the boards in this dam, whereas the evidence showed that he put them in himself. Certainly the proof of the greater included proof of the lesser, and if he put in these boards in violation of the decree and put water all over the Luig land, as the testimony shows he did, he certainly assisted Luig in violating the terms of the decree, and this whether he assisted him with Luig's knowledge or without his knowledge. No such transparent evasion of a decree can be permitted (*State* v. *Lavery*, 31 Or. 77).

3. As to the matters on the east fork, counsel first say that they were "trivial." Considering that they involve the taking of all of the water of that fork of the river during the only period when the river even approached what would be called a flood, such a characterization would appear to be used more in a facetious than a serious sense. It may seem "trivial" to the appellant to deprive the complainant of all of the water of the river, and we suppose this is also in keeping with the aim of the appellant not to be "technical" (p. 206-7). To be "technical" would be to take just exactly what a man was entitled to, nothing more or nothing less. To be generous would be to give your neighbor a little more than he was entitled to, and we leave it to the appellant and to the court to invent the proper word to characterize the conduct of the appellant in taking all of the water of the river at a time when he was not entitled to take any of it.

4. As to the drain ditch, defendant complains because the court provided he might purge himself of contempt "by closing the drain ditch so as to prevent the same from diverting water from said river or from being used except to drain surface water from the lands described in the decree." This was intended to be, and would seem to be, in strict accord with the decree, which is that he might use the drain ditch only "for the purpose of draining water from the surface of the land above described." Personally, we were never able to see why it should be held that Hanley should be permitted to divert water from *the river* to drain surface water from the land, but if the original decree is subject to that interpretation, the contempt order is likewise. On the merits of the use of the drain ditch, appellant's argument is a series of contradictions. In the first place, he attempts to justify the diversion of water through the drain ditch, which admittedly continued up until the 8th of April, because there was ice in the river; whereas the testimony shows that the month of March was not at all a freezing month (Appellee's Printed Rec., pp. 59-60); and then he contends that he is entitled to use the drain ditch during a flood, but the record shows there was no flood that year (Appellant's Printed Rec., pp. 169-170); and then on the other hand he claims that he may use the drain ditch to drain the water out of the river, although it deprives the complainant even of stock water, which would mean that he might take it out at the lowest stages of the river (Brief, p. 82).

Counsel contend that we did not show that the water going through the drain ditch was being used by Hanley for irrigation. The photographs themselves show the

water seeping all over his land, but it is entirely unnecessary for us to assume the burden of proof of an entirely immaterial matter. Whether he takes this water for his own use or simply to spite the Pacific Live Stock Company is entirely immaterial to us. All we know is that the evidence shows that this water is taken away from a great body of our land to the destruction of our crops, and that is all that we need to show in this proposition. In this connection, the court should not be misled by the fact that the drain ditch leads down to one section of land that the company owns; that is an isolated section of land, far removed from the great body of land of the complainant where it desires and wants this water during that season of the year, but it should also be noted that it is stated in counsel's brief that the Pacific Live Stock Company has no interest in the drain ditch. This remark does not seem to have any relevancy to this case, and we simply refer to it for the purpose of avoiding any contention that we acquiesce in counsel's statement. Counsel's own brief shows that it was constructed partially for the irrigation of our section thirty-six, and whether we have any right to irrigate that section through that ditch is not involved in this matter.

Counsel's attempt to obviate the clear conclusion of the trial court that Hanley's claim that he had the drain ditch open for the purpose of draining water off his land was not made in good faith, in view of the fact that he himself was using every means to divert water onto the lands, is unavailing. The evidence shows without any dispute that through his ditches and by means of his dams and through the cuts in the bank of the river, he was diverting all of the water of the river, and photographs of his land are

the best evidence of that fact; and his further insincerity in claiming that if he did not divert it through the drain ditch it would overflow his land below in section thirty-five is made still more ludicrous when he was at the same time objecting to the Pacific Live Stock Company diverting water out through their ditch in the adjoining section thirty-four, which would have the same effect as his drain ditch.

5. As to the cuts in the bank of the river, counsel's plea again is deprived of all sincerity by the constant reiteration of the fact that he does not want these cuts open and has done everything to keep them closed. Why then should he come before this court on appeal as one aggrieved by a decree which directed him to do the exact thing which he says he desires to do, and to have done? The reason is obvious by reference to page 75 of his brief, where he says he wants to keep them closed, but "he wants to do it for his own purposes, as above explained," which means that he wishes to leave them open with some little sticks in at the head, where he can put in a bunch of stack bottom and keep the water out if he does not want it, or conveniently remove it if he does, instead of in good faith filling them up with plows and scrapers, as his own witnesses testified was the proper method to follow. We can not too earnestly call the attention of the court to this situation. This decree having specified the means of diversion which the various defendants may use, and having also given them the benefit of the natural overflow (which could scarcely be taken away anyhow by a lower owner), to now permit each defendant to either actively or passively allow openings or cuts to be made in the banks where the water might run out unrestrained,

particularly in view of the fact that the bank of the river is higher than the adjoining land, would be to make this decree a mockery and authorize them ultimately to take all of the water of the river.

6. There is one matter contained in counsel's brief that seems to us might very much better have been omitted. By reason of a very unfortunate answer filed by Hanley, claiming that none of these violations had been called to his attention, and particularly referred to certain conversations with Mr. Treadwell to support that contention, it was necessary for Mr. Treadwell to take the stand, which is always a disagreeable thing for counsel to be compelled to do, but the trial court heard the evidence of both Mr. Hanley and Mr. Treadwell in this matter, and it is sufficient to say that it appeared that Mr. Treadwell not only complained to Mr. Hanley about the conditions on the east fork, but also complained to his attorney, Judge Webster. Counsel then attempted to further cloud the issue by claiming that our hostility to Mr. Hanley grew out of a matter affecting our land title, and put in a couple of letters on that subject, which he has included in his record in this court. This matter was disposed of to the satisfaction of the trial court by the following testimony, which appellant has omitted from his record:

> "The feeling of hostility to Mr. Hanley has been from the very first time that he violated this decree, which he violated, and has been held to have violated a few years after it was entered. Our hostility to him has been continued and consistent, from that time, and he has violated it, in our opinion, every year since that time. We have had numerous proceedings against him, without any results. So, as far

> as the feeling is concerned, it is there irrespective of the suit [as to the land title]" (Appellee's Printed Rec., pp. 43-44).

His lack of sincerity in this matter was very apparent to the trial judge by the fact that when this contempt proceeding was commenced he had published in the "Oregon Journal" a nasty attack upon the complainant, complaining that it was trying to keep the land for range, whereas he himself has never sold an acre of his land to the people (Appellee's Printed Rec., pp. 44-6). It seems to us that there was little enough excuse for bothering the trial court with matters of this kind, and that there is no excuse for bothering this court with them.

We respectfully submit that the appeal should be dismissed or the order affirmed.

Respectfully submitted,

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellee.